Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In the Supreme Court of the United States
October Term, 1998

WAYNE JACKSON, DEPUTY WARDEN,

Petitioner,

v.

JEFFREY DYE AND GREGORY TURNER,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the attorney fee provision of the Prison Litigation Reform Act, PLRA § 803, 42 U.S.C. § 1997e(d), apply to fees for services in litigation which was pending on the effective date of the PLRA?

PARTIES TO THE PROCEEDING

At the time of the events giving rise to this litigation, Petitioner, Wayne Jackson was a Deputy Warden at the State Prison of Southern Michigan at Jackson and, Respondents, Jeffrey Dye and Gregory Turner were inmates confined by the Michigan Department of Corrections.

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Petitioner respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on December 15, 1998.

OPINIONS BELOW

The December 15, 1998 opinion of the Court of Appeals is not reported and is reprinted in the Appendix to this Petition, App. 1a-6a. The prior opinions of the United States District Court of the Eastern District of Michigan, entered May 22, 1997 are not reported, and are reprinted in the Appendix to this Petition, App. 7a-15a.

JURISDICTION

Petitioners seek review of the opinion of the United States Court of Appeals for the Sixth Circuit entered on December 15, 1998.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 802(b)(1) of the Prison Litigation Reform Act, 18 U.S.C. § 3626, provides:

> Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.

Section 803(d) of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d), amending section 7 of the Civil Rights of Institutionalized Persons Act provides:

(d) ATTORNEY'S FEES.-(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that -

(A) the fee was directly and reasonably incurred in proving an actual violation of the Plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the Defendant. If the award of attorney fees is not greater than 150 percent of the Judgment, the excess shall be paid by the Defendant.

(3) No award of attorney fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3055A of Title 18, United States Code, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the

fee is paid by the individual rather than by the Defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).

STATEMENT OF THE CASE

This case concerns an award of attorney fees in a prisoner civil rights case brought pursuant to 42 U.S.C. § 1983. Respondents filed this case in the district court in 1995, claiming Petitioner failed to protect Respondents from assaults by other inmates, in violation of the Eighth Amendment. Respondents claimed they had each repeatedly told Petitioner about their fears of assault by other inmates, but Petitioner failed to take any action to protect either Respondent. Each of the Respondents claimed he was ultimately assaulted by other inmates. The cases were initially tried resulting in a hung jury. On retrial a second jury found liability, but awarded zero damages. Petitioner moved for a judgment as a matter of law, while Respondents moved for a new trial limited to compensatory and punitive damages only. The district court then ordered new trials for each of the Respondents as to compensatory damages only.

The third and fourth juries awarded Respondent Turner $13,000 and Respondent Dye $5,000.00. The district court entered judgments on December 2, 1996. App., p. 2a. Thereafter Respondents, as prevailing parties, applied for attorney fees. Respondents applied for $36,000 for attorney Manville's fees based on an hourly rate of $150.00. Respondents sought $6250.00 in fees based on an hourly rate of $125.00 for attorney Steinberg's work. (App., pp. 1a-6a.) In addition, Respondents requested $13,555.00 as attorney fees for litigating the question of attorney fees. (App., p. 1a, fn 1) Petitioner argued that the PLRA should be applied to limit the award of attorney fees.

The Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996), (PLRA), was signed into law by President Clinton and took effect on April 26, 1996.[1] The PLRA was intended to stem the tide of frivolous prisoner

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[1] The PLRA is found in Title VIII of the omnibus appropriation bill for the fiscal year 1996 for the Departments of Commerce, Justice and State, the Judiciary and Related Agencies.

suits[2] and to curtail the overly intrusive involvement of federal courts in managing state prison systems pursuant to remedial orders and consent decrees. Section 803(d) of the PLRA includes the provision governing the award of attorney fees in prisoner civil rights litigation.

The PLRA's effective date was April 26, 1996. In the United States District Court for the Eastern District of Michigan, $75.00 per hour is the maximum amount a court-appointed attorney may be reimbursed pursuant to 18 U.S.C. § 3006A(d)(1), thus if 42 U.S.C. § 1997e(d)(3) applies the maximum hourly rate is $112.50 (150 percent of $75.00).

In the district court, Petitioner argued that several provisions of the PLRA should limit the fees sought by Respondents:

> Respondents can recover no more than 150% of the judgments, ie, $27,000 for attorney fees from Petitioner. The Respondents' attorneys would have to collect any fees in excess of $27,000 from Respondents. 42 U.S.C. § 1997e(d)(2).
>
> The maximum hourly rate for either of Respondents' attorneys should be limited to $112.50. 42 U.S.C. § 1997e(d)(3).
>
> Respondents should be required to pay as much as 25% of their combined judgments of $18,000.00, ie. $4500.00 to their attorneys for attorney fees. 42 U.S.C. § 1997e(d)(2).
>
> Respondents cannot recover fees for litigating the issue of attorney fees. 42 U.S.C. §

[2] *See, e.g.*, 141 Cong. Rec. S14316 (daily ed., Sept. 26, 1995) (statement of Sen. Abraham) (in addition to problems with "massive judicial interventions in state prison systems, we also have [the problem of] frivolous inmate litigation); 141 Cong. Rec. S14414 (daily ed., Sept. 27, 1995) (statement of Sen. Dole) (legislation introduced, S. 1279, will address the "alarming number of frivolous lawsuits" filed by prisoners).

1997e(d)(1).

Despite the fact that the final judgments in this case were entered by the District Court in December 1996, well after the PLRA's April 26, 1996 effective date, the district court declined to apply the PLRA and awarded Respondents $41,130.00 based on an hourly rate of $150.00 per hour for the work of Mr. Manville and awarded Respondents $14,675.00 for Mr. Steinberg's work based on an hourly rate of $125.00 per hour. (App., p. 6a.)

Both Respondents and Petitioner appealed. On appeal Petitioner raised a number of issues, only one of which is pertinent here: Petitioner argued that the district court erred in failing to apply the PLRA limits to the Respondents' attorney fee petition.

On December 15, 1998, without discussion, the Court of Appeals issued its Opinion affirming the District Court's decision that held the PLRA fee provision inapplicable to fees in this case stating: "Jackson's final ground for appeal, that the Prison Litigation Reform Act should be applied retroactively to limit Dye and Turner's recovery of attorney's fees also fails. In *Hadix v. Johnson*, 143 F.3d 246, 248 (6th Cir. 1998), this Court held that the Act should not be applied retroactively." (App., p. 10a.) One month earlier on November 16, 1998, this Court granted certiorari in *Johnson v. Hadix*, No. 98-262, and it remains pending.

REASONS FOR GRANTING THE WRIT

THIS CASE RAISES QUESTIONS REGARDING PLRA FEE LIMITATIONS IDENTICAL TO THOSE RAISED IN *JOHNSON v. HADIX*, No. 28-262. THIS COURT SHOULD GRANT CERTIORARI IN THE INSTANT CASE FOR THE SAME REASONS IT GRANTED CERTIORARI IN *HADIX*, OR ALTERNATIVELY, IT SHOULD HOLD THIS CASE IN ABEYANCE PENDING THIS COURT'S DECISION IN *HADIX*.

The Sixth Circuit's opinion in this case, declining to apply the PLRA attorney fee limits, was based entirely on the Circuit's earlier opinion in *Hadix v. Johnson*, 143 F.3d 246, 255-56 (6th Cir. 1998), cert granted, *Johnson v. Hadix*, 119 S.Ct. 508, (U.S. Nov 16, 1998) (No. 98-262), in which that court held that the PLRA does not apply to any attorney fees awarded in a case pending prior to the effective date of the PLRA, regardless of when the legal work was done and regardless of whether the fees were awarded after the effective date of the PLRA, conflicts with all other circuits which have reviewed this issue.

The Fourth, Eighth and Ninth Circuit Courts of Appeal have held that the PLRA's attorney fee provisions apply to legal fees earned in actions pending on the date of enactment. *Alexander S. v Boyd*, 113 F.3d 1373 (4th Cir. 1997) *cert. den.* 139 L. Ed. 2d 869 (1998); *Williams v. Brimeyer*, 122 F.3d 1093 (8th Cir. 1997) (holding that fees for work performed after the PLRA's enactment are subject to the PLRA limitations, though the case was pending prior to the PLRA's enactment); *Madrid v. Gomez*, 150 F.3d 1030, (9th Cir., 1998).

The D.C. Circuit held that for work performed after the effective date of the PLRA, there is no retroactivity concern in applying the fee limitations of the statute. In dicta the D.C. Circuit indicated that for cases pending on the effective date

of the PLRA, legal work performed prior to the effective date of the act would not be limited by the PLRA. *Inmates of D.C. Jail v. Jackson,* 158 F.3d 1357 (D.C. Cir. 1998).

The Seventh Circuit held that where the district court awarded fees prior to the PLRA enactment, those fees were not subject to the PLRA limits, though the case was still pending on appeal when the PLRA was enacted. *Cooper v. Casey* 97 F.3d 914, 921 (7th Cir. 1996). In a similar case, *Jensen v. Clark*, 94 F.3d 1191 (8th Cir. 1996), the Eighth Circuit held that where the district court entered judgment and an award of attorney fees long before the PLRA was enacted, the PLRA limits on fees were inapplicable, though the case was pending on appeal when the PLRA was enacted. The D.C. Circuit was not called upon to decide the issue of whether fees for services performed prior to the PLRA's enactment are subject to the PLRA limits, but indicated in dicta that it would likely hold that the PLRA limits would not apply. *Inmates of D.C. Jail v. Jackson*, 158 F.3d 1357, 1360 (D. C. Cir. 1998).

The Second Circuit held that the PLRA does not apply to fees for work performed pre-enactment though fees for that work were awarded by the district court after the PLRA was enacted. *Blissett v. Casey,* 147 F.3d 218 (2d Cir. 1998) The Second Circuit did not, however, address the question of fees for work performed post-enactment in a case which was filed prior to the PLRA's enactment. The Second Circuit also suggested, without citing any authority, that the question of whether to apply PLRA limits to fees awarded for work performed after the PLRA's enactment might be left to the discretion of the district court.

The Sixth Circuit stands alone in its position that the PLRA does not apply to any fees awarded in § 1983 actions filed before the statute's enactment. *Hadix v. Johnson,* 143 F.3d 246 (6th Cir. 1998), cert. granted sub nom *Johnson v. Hadix,* No. 98-262. This Court granted certiorari in *Hadix* to address these questions: 1. Whether, in litigation pending on the effective date of the Prison Litigation Reform Act, the attorney fee provision of PLRA Sec. 803(d), 42 U.S.C. Sec. 1997e(d), applies to fees awarded after the Act's effective date for services rendered after that date. 2. Whether, in such

litigation, this fee provision applies to fees awarded after the Act's effective date for services rendered before that date. The instant case presents these identical issues.

This Court has repeatedly held that certiorari review is appropriate where there is a conflict among the several courts of appeal regarding the general principles or reasoning. Supreme Court Rule 10(a); *United States v. National Bank of Commerce*, 472 U.S. 713, 719 (1985); *Oregon Dep't of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 764 (1985); *Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975).

The Court of Appeals in the instant case has misapprehended decisions of this Court and the intent of Congress on an important federal question being litigated throughout the country. The PLRA is comprised of ten sections; the attorney fee provisions are contained in § 803 which is codified at 42 U.S.C. § 1997e(d). The Court of Appeals failed to give effect to the plain language of § 803 which is applicable to all litigation brought by prisoners, no matter when begun. The clear and unambiguous words of the statute apply to all pending cases and all awards of attorney's fees made after the Act's effective date: "In *any* action brought by a prisoner who *is* confined. . . in which attorney fees are authorized. . . . No *award* . . . shall be based. . . ." Only § 802, dealing with injunctions, consent decrees and other prospective relief in prison litigation, codified at 18 U.S.C. § 3626, expressly applies to pending actions. The Court of Appeals erred by concluding that Congress's inclusion of a provision applying a different part of the Act (section 802) to pending cases, combined with the absence of any explicit provision prescribing the fee provisions' reach, implies that Congress intended the fee provisions to apply only to cases filed after the Act's passage.

In the absence of conclusive evidence of congressional intent the inquiry turns to whether the provision, if retrospectively applied, would have an impermissible retroactive effect. The plain text of section 803(d), the nature of attorney fee awards and this Court's longstanding retroactivity jurisprudence all support the conclusion that the attorney fee limitation applies to attorney fee awards made

after the effective date of the Act, regardless of when the services were rendered. Even though the statute does not expressly state that it is applicable to pending cases, this Court's longstanding retroactivity jurisprudence compels that result. As the Supreme Court stated in *Landgraf*, normally " 'a court is to apply the law in effect at the time it renders its decision.'" 511 U.S. at 264, 114 S. Ct. 1483 (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974)).

Questions of attorney's fees are "collateral to the main cause of action" and are "uniquely separable" from it. *Landgraf v. USI Film Products*, 511 U.S. 244, 277 (1994). There is no support for the proposition that attorney fees under 42 U.S.C. § 1988 are not collateral, but integral to the underlying case. The law clearly reflects that collection of attorney fees under 42 U.S.C. § 1988 is ancillary to the relief sought to remedy the underlying violation. *Hutto v. Finney*, 437 U.S. 678, 695; *Plaut v. Spendthrift*, 514 U.S. 211, 131 L. Ed. 2d 328, 353; 115 S. Ct. 1447 (1995). In *Hutto*, this Court states that 42 U.S.C. § 1988 imposes attorney's fees "as part of the costs":

> Unlike ordinary "retroactive" relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief.

Hutto, 437 U.S. at 695, fn 24.

Fee shifting statutes like the one at issue here are procedural in nature, prospective and injunctive in operation and do not involve vested rights. Because the desire for attorney's fees at an ever-increasing "prevailing rate" is merely a unilateral hope rather than an entitlement, applying an intervening fee shifting statute in pending litigation does not result in any unfairness. The appropriate compensation for plaintiffs' counsel in prisoner litigation is subject to the discretion of Congress and there is no constitutional, statutory or jurisprudential reason not to give effect to Congress's obvious intent in all cases where attorney's fee awards are

made after the effective date of section 803(d), regardless of when the services were rendered.

In each of *Bradley*, *Hutto* and *Langraf*, the cases were pending on appeal when the new statute at issue was enacted and the provisions of the new statute were nonetheless applied. In the instant case, the case was still pending in the district court when the PLRA was enacted. Respondents did not file their ultimately successful petition for fees until after the enactment of the PLRA. The status of the instant case argues more strongly for application of the new law, i.e., the law in effect at the time the court reached its decision on the attorney fees petition. In the instant case, no "rights previously vested are injuriously affected" *Landgraf* at 128 L. Ed. 2d at 256 by applying the PLRA, since no decision had been made as to what constituted a reasonable attorney fee by the district court in this case, until months after the PLRA took effect. Therefore, applying the PLRA here would have no "retroactive" effect.

This Court has already granted certiorari to review these questions in *Hadix*. Unless this Court reverses the erroneous decision of the Court of Appeals in *Hadix* and in this case, Michigan taxpayers will be required to pay hundreds of thousands of dollars in attorney fees under the PLRA, 42 U.S.C. § 1997e(d), contrary to the clear dictates of the act. The fees at issue in the instant case should be subject to the jurisprudence of this Court as will be set forth in the upcoming decision in *Hadix*. Accordingly, this Court should hold this case in abeyance pending a decision in *Hadix* and, upon such decision, summarily reverse the court below or vacate the decision below and remand for consideration of this Court's opinion in *Hadix*.

CONCLUSION

For all these reasons, Petitioners respectfully urge this Court to grant certiorari or, in the alternative, hold this case in abeyance pending a decision in *Hadix* and upon that decision, remand for consideration of this Court's decision in *Hadix*.

Respectfully submitted,

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March, 1999

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEFFREY DYE and
GREGORY TURNER,

Plaintiffs,

CASE No. 95-70065
HONORABLE AVERN COHN

v.

WAYNE JACKSON,

Defendant.

MEMORANDUM AND ORDER

I.

This is an attorney's fees application, 42 U.S.C. § 1988. Daniel Manville (Manville) and Michael J. Steinberg (Steinberg), attorneys for Jeffrey Dye (Dye) and Gregory Turner (Turner), have requested award of their attorney's fees for representing prevailing plaintiffs in a prisoner-civil rights case, 42 U.S.C. § 1983. Manville seeks $36,000 in fees, Steinberg seeks $6250 in fees, and both request costs of $1627.[1] Defendant Wayne Jackson (Jackson), a former corrections officer, argues that their fee request must be reduced pursuant to the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997e(d). Manville and Steinberg contend that the PLRA does not apply retroactively and, in the alternative, is unconstitutional.

For the reasons that follow, Manville and Steinberg's applications are GRANTED without the limitations imposed by the PLRA. Because Jackson has not opposed the itemized

[1] Manville and Steinberg also jointly request fees for litigating their fees in the amount of $13,555.

hours on the applications, Manville and Steinberg will be compensated according to their calculations.

II.

Dye and Turner, inmates of Jackson Prison, suffered stab wounds while incarcerated. In 1995, Dye and Turner sued Jackson, the one-time deputy warden of the prison, and their cases were tried to juries on four separate occasions. At the first trial in May 1996, a jury hung on a 4-4 vote. In July 1996, at the second trial a jury found liability and proximate cause, but zero damage. The Court granted Dye and Turner's motion for new trials solely on the issue of compensatory damages. At the third trial in November 1996, a jury awarded Turner $13,000. At the fourth trial shortly thereafter, a jury awarded Dye $5000.

III.

Attorneys for prevailing plaintiffs in 42 U.S.C. § 1983 cases may recover their reasonable attorney's fees and costs. 42 U.S.C. § 1988. In representing Dye and Turner, Manville and Steinberg won money judgments and as such are entitled to fees for representing prevailing plaintiffs. *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) ("[To qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought....). Manville and Steinberg are also entitled to their reasonable costs and expenses. *Northcross v. Board of Education of the Memphis City Schools*, 611 F.2d 624, 639 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980)

A.

Jackson argues that attorney's fee provisions of .the PLRA, 42 U.S.C. § 1997e(d), also apply to Manville and Steinberg. The Act went into effect on April 26, 1996, and the attorney's fee provisions are as follows:

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized

under section 1988 of this title, such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights-protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B) (i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation;

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150% of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of courtappointed counsel.

42 U.S.C. § 1997e(d)

Based on the PLRA, Jackson argues that Manville and Steinberg's fees should be calculated as follows:

- Manville and Steinberg can recover no more than 150% of the judgments, or $27,000, from Jackson. They would have to collect any fees in excess of $27,000 from Dye and Turner. 42 U.S.C. § 1997e(d) (2).

- Manville and Steinberg's hourly rates would be capped

at $112.50, instead of $150 and $125 respectively. 42 U.S.C. § 1997e(d)(3).

- Manville and Steinberg must recover as much as 25% of the base $27,000 from Dye and Turner, which in this case would be $4500. 42 U.S.C. § 1997e(d) (2)

- Manville and Steinberg cannot recover the fees incurred in litigating for their fees. 42 U.S.C. § 1997e(d) (1)

B.

Assuming Jackson's reading of 42 U.S.C. § 1997e(d) is correct, the PLRA nevertheless does not apply to Manville and Steinberg. Manville and Steinberg filed this case in 1995, and the PLRA took effect on April 26, 1996. The PLRA attorney compensation provisions are not retroactive. *See Cooper v. Casey*, 97 F.3d 914, 921 (7th Cir. 1996); *Jensen v. Clarke*, 94 F.3d 1191, 1201-03 (8th Cir. 1996). To apply the PLRA provisions now would work an injustice to Manville and Steinberg's settled expectations in taking on this case. As the United States Court of Appeals for the Seventh Circuit stated:

> To give (the PLRA retroactive] effect would attach (without clear indication of congressional intent to do so) new legal consequences to completed conduct, namely the services rendered by the plaintiffs' counsel in advance of the passage of the new Act.

Cooper, 97 F.3d at 921 (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994)).

Jackson argues, however, that the PLRA applies to all of Manville and Steinberg's work performed after the PLRA date of enactment of April 26, 1996. For example, in *Hadix v Johnson*, 947 F. Supp. 1113 (E.D. Mich. 1996) (Feikens, J.), the district court applied the PLRA's lower hourly rates to an attorney's work performed after the date of enactment, even though the case was filed prior to the date of enactment. *Id.* at 1115. The district court reasoned:

> I cannot say that Congress's intent to limit

> plaintiffs' counsel to $112.50 per hour is so fundamentally unfair as to result in manifest injustice. Nor can I say that this legislation unreasonably disrupts settled expectations.

Id.

The Court does not agree with the holding of *Hadix*. In *Hadix* the district court inexplicably considered only the lowerhourly rates of the PLRA, despite the directive that "[w]e do not...construe statutory phrases in isolation; we read statutes as a whole." *United States v. Morton*, 467 U.S. 822, 828 (1984).[2] If all attorney's fee provisions of the PLRA are fully implemented, however, the PLRA would limit Manville and Steinberg's fees in more significant ways than reducing their hourly rates. For example, Manville and Steinberg would have to collect as much as $19,000 from Dye and Turner. Manville and Steinberg possibly could not recover the fees for litigating for their fees.

When examining the proposed retroactivity of a given statute, the Seventh Circuit refused to look at one section in isolation. "[I]n this case, we cannot look only at the effective date section itself. 'In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'" *Orreao v. 833 West Buena Joint Venture*, 943 F.2d 730, 734 (7th Cir. 1991) (quoting *K Mart Corp. v. Cartier. Inc.*, 486 U.S. 281, 291 (1988)). Examining the PLRA

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[2] *See also Llamas-Almaguer v. Wainwright*, 666 F.2d 191, 194 (5th Cir. Unit B 1982) ("The courts may not pick and choose the sections of title III to which they will give or not give full effect, based on their own views of the virtues and vices of the exclusionary rule of *Mapp v. Ohio.*"); *Bates & Rogers Construction Corp. v. Continental Bank*, 97 B.R. 905, 907 (N.D. Ill. 1989) ("(C]ourts are not allowed to pick and choose which subsections of a statute they wish to apply when Congress has directed that an entire section shall apply in a given situation.").

In the analogous situation of interpreting seemingly conflicting statutes, "[j]udges 'are not at liberty to pick and choose among congressional enactments, and when two (or more] statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *County of Yakima v Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 265-66 (1992) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

in its entirety, if the PLRA is applied to fees incurred after the date of enactment, such application would work retroactively because it would limit Manville and Steinberg's fees incurred prior to the date of enactment. To fully apply the PLRA to post-April 26, 1996 work would also shift the burden for many of Manville and Steinberg's fees to Dye and Turner, who presumably did not contemplate such burdens when they decided to sue Jackson. The PLRA would upset the settled expectations of Dye and Turner in bringing suit, as well as the settled expectations of Manville and Steinberg in representing them. In the absence of an explicit congressional directive, application of the PLRA in this situation has an impermissible retroactive effect. *See Landgraf*, 511 U.S. at 270.

Thus Manville and Steinberg should be reasonably compensated under 42 U.S.C. § 1988. The Court has previously compensated Manville at the rate of $150 per hour and Steinberg at the rate of $125 per hour. Jackson apparently does not dispute the time billed, and thus Manville and Steinberg are to be fully compensated.[3]

IV.

For the reasons stated above, Manville and Steinberg's application is GRANTED. Manville shall receive $41,130 in fees, Steinberg shall receive $14,675 in fees, and both shall receive $1627 in costs. If necessary, an appropriate form of judgment shall be submitted on notice by Dye and Turner.

SO ORDERED.

DATED: May 22, 1997
Detroit, Michigan

AVERN COHN
UNITED STATES DISTRICT JUDGE

[3] Because the PLPA does not apply to Manville and Steinberg's attorney's fees, the Court will not address their argument that the PLRA is unconstitutional under *Romer v. Evans*, 116 5. Ct. 1620 (1996).

FILED
DEC 15 1998
LEONARD GREEN, *Clerk*

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Nos. 96-2545/96-2569/97-1717

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEFFREY DYE and GREGORY TURNER,

Plaintiffs-Appellees,

v.

WAYNE JACKSON, ,
DEPUTY WARDEN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Defendant-Appellant,

JOHN JABE and Manager HAWKINS,

Defendants.
_____/

BEFORE: MARTIN, Chief Judge; KENNEDY and SILER, Circuit Judges.

PER CURIAM. These three consolidated appeals arise from a complaint filed on January 6, 1995, in the Eastern District of Michigan by Gregory Turner and Jeffrey Dye, inmates of the Jackson State Prison of Southern Michigan, who sought damages for violations of their constitutional rights under 42 U.S.C. § 1983. In the underlying action, Turner and Dye alleged that Deputy Warden Wayne Jackson acted with deliberate indifference to threats against Turner and Dye's safety in violation of their Eighth Amendment right to be free from cruel and unusual punishment.

In 1982, Turner pled guilty to a charge of second degree murder. Since that time, he has been confined in various facilities of the Michigan Department of Corrections. After his incarceration, Turner testified against his co-defendant, Keith Lewis, who was ultimately convicted of first degree murder and sentenced to mandatory life imprisonment. Turner was given no promises by the state for his testimony, except that he would be assigned to a prison where Lewis was not an inmate because Lewis and his friends had threatened to injure Turner in retaliation for his testimony against Lewis.

However, in 1987, both Lewis and Turner were confined to the Jackson State Prison. At this time, Lewis and his friends threatened Turner, who alerted Jackson about his fears for his own safety. Jackson told Turner to send him a note indicating his concern for his personal safety. Turner claims he wrote at least three letters to Jackson and spoke with him on multiple occasions about the threats Lewis had made against him. Turner also arranged for his mother to speak with Jackson about transfening Turner to another facility. Jackson took no action to protect Turner, and on September 18 another inmate, associated with Lewis, stabbed Turner in the chest. The resulting wounds required surgery and Turner was hospitalized for nine days.

Similarly, a fellow inmate stabbed Dye, despite his having repeatedly warned Jackson of the threats made against his personal safety and requests for protection. On October 28, Dye was transferred to Jackson State Prison. He was stabbed in the yard that same day by members of a prison gang that he had refused to join. After this initial stabbing, Dye claims to have written at least three or four letters to Jackson concerning his fears for his personal safety and also arranged for his mother to speak with Jackson. On December 15, Dye personally met with Jackson, who told him not to worry about the threats.

Later that day, Jackson transferred Dye to 4-block, a maximum security block, and the most notoriously violent block in the facility. Fearing for his safety, Dye did not leave his cell in 4-block from December 16 to 19. When he left to call his mother on December 19, three masked inmates stabbed

him: twice in the head, twice in the back, and once in the neck.

Turner and Dye brought a joint § 1983 action against Jackson, alleging that his deliberate indifference to the threats made against their personal safety violated their Eighth Amendment rights. Jackson moved for summary judgment. The district court denied his motion and the case proceeded to a trial which resulted in a hung jury. In a new trial, the jury found that Jackson's deliberate indifference caused Turner's and Dye's injuries, but awarded zero damages to both Turner and Dye.

Jackson then moved for judgment as a matter of law and Turner and Dye moved for a new trial limited to the issues of compensatory and punitive damages. The district court denied Jackson's motion and ordered a new trial on the issue of compensatory damages only. In separate trials limited to the issue of compensatory damages, juries awarded Turner and Dye damages in the amount of $5,000 and $13,000, respectively. As prevailing parties, Turner and Dye sought and were awarded attorney's fees and costs under 42 U.S.C. § 1988.

Jackson appeals the denial of his motion for judgment as matter of law, alleging error in both the joinder of the plaintiffs and the granting of a new trial on the issue of damages alone. Jackson also argues that the Prison Litigation Reform Act, 42 U.S.C. § 1997e, should be applied retroactively, thereby limiting the award of attorneys' fees. Turner and Dye cross-appeal, urging that the trial court erred in failing to give the jury an instruction regarding punitive damages.

Jackson's appeal of the district court's denial of his motion for judgment as a matter of law cannot succeed. First, the district court's decision to join the plaintiffs in this action was appropriate. Rule 20(a) of the Federal Rules of Civil Procedure permits plaintiffs to join in a single action "if they assert any right to relief; jointly, severally, or in the alternative. . . arising out of the same transaction, occurrence, or series of transactions or occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." In *Lasa Per L 'Industria Del Marmo Societa Per Azioni v. Alexander*, 414 F.2d 143, 147

(6th Cir. 1969), we held that the terms "transaction or occurrence" are to be given a broad and liberal interpretation. The district court determined that because both events occurred at the same place, and because two trials would have caused the same witnesses to be called twice, judicial economy favored allowing both Turner and Dye to proceed in a single action. Such a determination was within the district court's discretion, therefore its decision to allow joinder of the actions stands.

Jackson's second allegation, that the district court should have granted his motion for judgment as a matter of law because the jury did not award Turner and Dye any damages, also cannot succeed. This Court recently held in *AIG Aviation, Inc. v. Boorom Aircraft, Inc.*, 1998 WL 69013, *5 (6th Cir. 1998) (unpublished *per curiam* opinion), that where a jury finds a defendant liable for injuries to a plaintiff but does not award the plaintiff any damages for those injuries, it is appropriate to grant a new trial limited to the issue of damages. Therefore the district court acted within the scope of its discretion when it granted a new trial limited to the determination of damages.

Jackson's final ground for appeal, that the Prison Litigation Reform Act should be applied retroactively to limit Dye and Turner's recovery of attorney's fees also fails. In *Hadix v. Johnson*, 143 F.3d 246, 248 (6th Cir. 1998), this Court held that the Act should not be applied retroactively.

We have also considered the other issues brought on appeal by the parties to this case and find them to be without merit.

For the foregoing reasons, the district court is AFFIRMED.

SILER, Circuit Judge, concurring in part and dissenting in part. I concur in the majority opinion relating to the case by Jeffrey Dye, but I respectfully dissent from the decision in the case involving Gregory Turner.

I do not think that Turner proved deliberate indifference by Jackson. Turner told Jackson about threats from Keith Lewis. Turner's mother also spoke with Jackson about transferring Turner to another facility. However, there was no specific information about a threat from Lewis's friends. As it turned out, the attack,on Turner was by someone other than Lewis, who was separated in the prison from Turner. The person who stabbed Turner was Peterson Bay, who was a "Moore," apparently a gang in which Lewis was a member. Turner had a warning from Cunningham Bay about two hours before he was stabbed, but he did not tell Jackson or anyone else on the staff about this threat. Turner also testified at the trial that he was not concerned about all the Moores and "Mobites," apparently another gang. He was just concerned about harm from Lewis. Admittedly, Turner's mother told Jackson that "Keith Lewis and his gang" were trying to kill Turner, but if Turner himself did not tell Jackson of his fear of the gang, an action for deliberate indifference to his welfare should not lie.

In order for Jackson to be liable, he must have known of a strong likelihood, not a possibility, of a risk of injury. *See Brown v. Hughes,* 894F.2d 1533, 1537 (11th Cir. 1990). Certainly, there was a likelihood of injury from Lewis, but if Turner himself did not fear other members of the gang, then Jackson would also not have known of any risk of injury.

For these reasons, I would reverse the judgment on behalf of Turner against Jackson.